No. 7721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES S. McKNIGHT,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

BRIEF AND ARGUMENT FOR APPELLANT

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BRIEF AND ARGUMENT FOR APPELLANT

Statement of the Case

James S. McKnight, together with Bley Stein and Robert E. Taylor, were indicted, charged with violation of Sections 88 and 335, Title 18, *United States Code.* The indictment was returned by the Grand Jury on, to-wit, the 6th day of September, 1933, and contained five counts. The first count of said indictment charged that the appellant James S. McKnight, together with the other defendants aforesaid, one Lee Ringer, and other persons unknown to the grand jury, entered into a conspiracy to commit an offense against the United States, the offense being "to deposit and cause to be deposited in the United States mails for transmission thereby to other persons postal cards and post cards upon which is delineated, written or printed epithets, terms and language that is libelous, scurrilous and defamatory and that is calculated by the terms and manner and style of display and obviously intended to reflect injuriously upon the character and conduct of another, to-wit, one Stephen W. Cun-

ningham, in violation of Section 335, Title 18, *United States Code.*"

This count of the indictment further charged nine overt acts, but for the purposes of this appeal we are concerned only with overt acts No. 5 and No. 8, for these alone set forth the postal cards. Overt act No. 5 alleges that on May 22nd, 1933, the defendants mailed and caused to be mailed a number of postal cards, on each of which was printed the following language:

"DEFEAT CUNNINGHAM FOR COUNCIL

WE PROTEST

Many people have been misinformed . . . and believe that Stephen W. Cunningham, candidate for counsel from the third district, is the "Graduate Manager" of the University of California at Los Angeles.

"In view of the fact that he is, in truth, NOT a graduate of our University and since his gross mismanagement of finances there has led to his dismissal, we believe that this erroneous impression should be corrected.

ALUMNI PROTEST LEAGUE
University of California at Los Angeles
215 West 7th Street."

The eighth overt act alleges that on the 15th day of May, 1933, the defendants had cards printed for mailing which contained the following subject matter:

"DEFEAT CUNNINGHAM FOR COUNCIL

His only qualification as candidate appears to be his association with the University of California at Los Angeles. Inasmuch as that

WE PROTEST association has not been a happy one, we are appealing to you to defeat this man who depleted our student body finances, and now seeks public office! U.C.L.A.

MISMANAGER CUNNINGHAM

HERE ARE THE FACTS:

7,000 U. C. L. A. STUDENTS
$126,000 DEFICIT

Cunningham was dismissed as manager of student affairs when the student body found itself without funds . . . and facing a deficit of $126,000.00.

IT TOOK 9 YEARS
TO DO IT
GOD HELP THE
TAXPAYERS IF
HE'S ELECTED
COUNCILMAN

We object to his attempt and that of his political backers to capitalize upon the dignity and good name of U. C. L. A.

ALUMNI PROTEST
LEAGUE
University of California at Los Angeles."

It will be noted that overt act No. 8 only alleges the printing of this card for mailing, whereas overt act No. 5 alleges that a number of the cards there set forth were actually mailed.

The second count of said indictment charged that the appellant and the other defendants did on or about the 22nd day of May, at Los Angeles, knowingly, wilfully, unlawfully and feloniously deposit or cause to be deposited for mailing and delivery in the Post Office establishment of the United States, a postal card with the proper postage thereon prepaid, addressed to a certain person named therein; the indictment then proceeds

to charge that said postal card "had delineated, written and printed thereon epithets, terms and language that was libelous, scurrilous and defamatory of and concerning one Stephen W. Cunningham, and which was calculated by the terms and manner and style of display to reflect injuriously upon the character and conduct of said Stephen W. Cunningham, and which was intended to reflect injuriously upon the character and conduct of said Stephen W. Cunningham." This count then sets forth the identical card alleged as overt act No. 5 of count 1.

The third, fourth and fifth counts of said indictment were identical in form and substance as the second count thereof, save that a different name and address is set forth respectively in each of said counts; the card alleged to have been mailed in each instance being the same card as set forth as overt act 5 in Count 1 (R. 10-15).

A demurrer was filed in behalf of the appellant, challenging the sufficiency of each count of the indictment, which, after argument, was overruled and an exception noted (R. 16, 26). The only ground of the demurrer that is involved in this appeal is the one challenging the sufficiency of each count of said indictment, to charge a public offense against the United States, in that: The matters alleged to have been deposited for mailing and delivery or printed for mailing are not upon their face libelous, scurrilous, defamatory and calculated to and obviously intended to reflect injuriously upon the character and conduct of said Stephen W. Cunningham.

A jury was selected, impaneled and sworn to try the appellant James S. McKnight and Robert E. Taylor on

the 19th day of December, 1934, and thereafter, on said 19th day of December, 1934, returned a verdict of guilty against the appellant James S. McKnight on Counts 1, 2, 3, and 4 of the indictment, and a verdict of not guilty as to the defendant Robert E. Taylor on all counts of the indictment (R. 26, 29).

Upon these verdicts the District Court on said 19th day of December, 1934, rendered judgment, sentencing the appellant James S. McKnight to be imprisoned for a period of sixty days in the Los Angeles County Jail, and to pay a fine of $500, on the first count of said indictment; and upon each of the second, third and fourth counts, to be imprisoned for a period of six months in said County Jail, said terms of imprisonment imposed on the second, third and fourth counts to begin and run concurrently, and not consecutively, and to be suspended for a period of two years on the condition that the defendant refrain from the violation of any laws of the United States (R. 30).

The evidence revealed the following material matters: That the appellant James S. McKnight was a member of the Common Council of the City of Los Angeles in May, 1933, and was a candidate for reelection; that his opponent in that political campaign was Stephen W. Cunningham (R. 60); that one Isadore Bley Stein (named as a defendant but not on trial) testified as a witness for the Government. He testified that he worked in the campaign headquarters of the appellant James S. McKnight for approximately fourteen days in May, 1933 (R. 43); that previous to his doing work at the campaign headquarters he had not known Mr. McKnight; that he

became acquainted with him on an occasion in May of 1933, when he introduced himself and "explained the fact that Cunningham had been dismissed as Manager of the University and * * * that if people knew that I didn't think he would get many votes" (R. 56); that he had arranged with Mr. McKnight "on the preparation of a newspaper" and that he told Mr. McKnight concerning Cunningham's "mismanagement of the affairs" at the University and "that those facts should be known to all of the voters" (R. 48); that he furnished "the information to Mr. McKnight and what he proposed to put out in the newspapers" (R. 44); that a draft of the text appearing in the post card set forth as overt act No. 5 of the conspiracy count and in the substantive counts of the indictment was prepared by him, with the exception of the phrase appearing therein "mismanagement of finances", which was suggested by Mr. McKnight in a conference on campaign literature (R. 51), when Mr. McKnight said: "It doesn't seem to say much. We had better say something about his not being a good manager", "and I told him that was all right." "That in that conversation he told Mr. McKnight that Mr. Cunningham was not a good manager, that he had mismanaged the finances up there at the university and that he had been dismissed from that position; * * * that he told Mr. McKnight that Cunningham had grossly mismanaged the finances there and that he could prove it" (R. 55); that he did not know when or how the sheet of paper which he submitted as a draft of campaign material (later appearing on Government's Exhibit 3, also 12 and 4, and being the same as the text of the card set

forth in each of the substantive counts of the indictment) was going to be used; that nothing was said concerning how the information contained (on that piece of paper) was to be disseminated to the public (R. 55).

Th evidence did not disclose that the appellant McKnight was directly responsible for the dissemination of this information by means of the mailing of the postal cards to the electorate. The evidence does disclose that there were a large number of persons employed or working at the McKnight campaign headquarters (R. 43). The evidence does disclose, however, that some one at his political headquarters had employed certain persons to address blank postal cards, among whom was one Angelina Hart, who identified the address on plaintiff's Exhibit No. 3 as being in the handwriting of her sister, who aided her in addressing the blank postal cards; that at the time of the addressing of these postal cards there was no printing on the reverse side thereof (R. 38); that someone at campaign headquarters where she had applied for work had given her the blank cards to address (R. 41).

Aside from the postal cards (which were all identical) set forth in the substantive counts of the indictment, as well as set forth as overt act No. 5 in the conspiracy count (Count 1), and received in evidence as plaintiff's Exhibits 1, 2, 3 and 4, which were respectively identified by the addressees as having been received through the United States mails, the only other card offered and received in evidence was in connection with the conspiracy count, namely, the card set forth in overt act No. 8.

In fact the record contains no evidence whatsoever that any other card was contemplated to be used in the campaign disseminating information concerning Mr. Cunningham's University activities other than the two set forth in the overt acts above enumerated. As to the latter card set forth as overt act No. 8, there is no evidence of any ever having been mailed. The evidence reflects that a permit was issued by the Post Office Department at Los Angeles to one Angelina Hart (R 35) and that a printer printed the text appearing in overt act No. 8 on post cards containing the permit number of the permit issued to Angelina Hart (R. 67).

Plaintiff's Exhibit No. 13 is a cardboard folder containing four of the cards set forth as overt act No. 8 of the conspiracy count (R. 68). The evidence shows that the cards containing the text appearing on the card set forth as overt act No. 8 were destroyed by and upon the initiative of Bley Stein (R. 86).

Motions for a directed verdict were interposed by appellant at the conclusion of the plaintiff's case, denied and exceptions allowed (R. 88); appellant renewed his motions for a directed verdict at the conclusion of all of the testimony, which motions were denied and exceptions noted (R. 89).

We have not undertaken a complete statement of all of the evidence, as much of it is immaterial to a consideration of the errors arising from the court's failure to grant the appellant's motions for a directed verdict, and this because the ultimate question in considering the alleged error in failing to direct a verdict for the appellant is limited to the text of the two cards set forth in

overt acts No. 5 and No. 8 of the conspiracy count of the indictment, as these were the only cards either mailed or contemplated to be mailed respecting which the government offered any evidence. In fact if it were not for the general character of the charge in the conspiracy count that it was the purpose of the defendants to mail or cause to be mailed "postal cards and post cards", the whole matter could be determined on the Court's ruling on this demurrer.

Of course this can be done in the instance of the substantive counts.

Error is also assigned to the action of the court in developing the fact that the witness Isador Bley Stein entered a plea of nolo contendere to the indictment.

The court in its instructions to the jury failed to give any instruction whatsoever on the presumption of innocence. The appellant had submitted certain approved forms of instructions on the principle of the presumption of innocence and requested the court to give the same; to the court's failure to instruct the jury upon the presumption of innocence, the appellant duly took an exception (R. 106, 109). The court's instructions in full are set forth in the Bill of Exceptions at pages 89 to 105.

Specifications of Error Upon Which Appellant Will Rely

I.

The District Court erred in refusing to charge the jury as requested in Appellant's Instruction No. 21:

> "The presumption of innocence goes with the defendant throughout the whole trial, even till the

verdict is rendered, and this presumption of innocence outweighs and overbalances all suspicions and suppositions, and can only be destroyed by proof beyond a reasonable doubt.' ' (A. E. 10, R. 129-130; Bill of Exceptions, R. 106.)

II.

The District Court erred in refusing to charge the jury as requested in appellant's Instruction No. 22:

"You are instructed that the presumption of innocence with which the defendant is at all times clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential, substantial part of the law and binding on you in this case, and it is your duty in this case to give the defendant the full benefit of this presumption, and to acquit this defendant unless the evidence in the case convinces you of his guilt as charged beyond all reasonable doubt." (A. E. 12, R. 129; Bill of Exceptions 109.)

III.

The District Court erred to the prejudice of the appellant when upon objection to plaintiff cross-examining its own witness, Isador Bley Stein, the court by its questions placed before the jury the fact that the witness Isador Bley Stein had entered a plea of nolo contendere to the indictment herein. Said questions asked by the court were as follows:

"By the Court: Are you a defendant in any civil suit pending between these other defendants?

A. No, sir.

Q. You entered a plea of what we call nolo contendere here in this case?

A. Yes, sir.

Q. And on the date that the plea was entered the United States Attorney, Mr. Carr, was here, was he not?

A. Yes, sir.

Q. And he suggested to the court that the government was willing that the court should receive that plea of nolo contendere, didn't he?

A. Yes, sir.

The Court: You may cross examine him, Mr. Carr.

Mr. Jones: Exceptions." (A. S. 7, R. 128; Bill of Exceptions, R. 46-47.)

IV.

The District Court erred in denying the motions made at the conclusion of the plaintiff's case, and renewed at the close of all of the evidence introduced in said case, to direct verdicts of not guilty upon each of the counts of the indictment. The grounds of said motion were, and the grounds of said error in denying said motion, were and are that the evidence adduced does not tend to prove that the appellant is guilty in manner and form as charged in any of the counts of said indictment, and is insufficient to support a verdict of guilty on any of said counts (A. E. 2, 3, 4 and 5, R. 119-120; Bill of Exceptions, R. 88, 89).

The appellant relies upon each assignment of error separately made to each count of the indictment respecting the question of the insufficiency of the evidence.

These assignments are not here repeated as they are similar in text.

V.

The District Court erred in overruling the demurrer interposed to the bill of indictment herein, and the grounds of said demurrer and the grounds of said error in overruling it, were and are as follows:

1. That the said indictment and each count thereof does not state facts sufficient to charge the said defendants, or either of them,

(a) With having committed any crime or offense against the United States of America;

(b) The matters and things alleged in each and every count of said indictment do not constitute an offense against the laws of the United States of America.

2. That the said indictment, and each and every count thereof, in the manner and form as the same are therein set forth and stated, is not sufficient at law to constitute a public offense against the United States, under the provisions of Title 18, Sec. 335, *U. S. C.*, or under the provisions of Title 18, Sec. 88, *U. S. C.*, in that:

The matters therein alleged to have been deposited for mailing or delivery are not upon their face libelous, scurrilous, defamatory, and calculated to and obviously intended to reflect injuriously upon the character and conduct of the said Stephen W. Cunningham. (A. E. 1, R. 118-119; R. 26.)

BRIEF OF ARGUMENT

I.

The Court Should Have Instructed on the Presumption of Innocence

The trial court, although instructing the jury on the doctrine of reasonable doubt (R. 104), failed to instruct the jury upon the principle of the presumption of innocence. The appellant, in his requested instructions Nos. 21 and 22, submitted proper statements of the law regarding the principle of the presumption of innocence (R. 106, 109). Although the court properly instructed on the doctrine of reasonable doubt, nevertheless the judgment and sentence of the court below must be reversed because of its failure to instruct on the presumption of innocence. The presumption of innocence is in the nature of evidence in favor of the accused introduced by the law in his behalf, whereas "reasonable doubt" is the condition of mind produced by the proof resulting from the evidence in the case. It is a result of the proof, not the proof itself.

The general principles involved are academic and the precise question has been determined by the United States Supreme Court in the following cases:

U. S. vs. Coffin, 39 L. Ed. 481, 492; 156 U. S. 432, 460;

U. S. vs. Cochrane, 39 L. Ed. 704, 708; 157 U. S. 286, 298.

II.

It Was Improper for the Court to Develop the Fact That One of the Defendants, Not on Trial, Had Entered a Plea of Nolo Contendere.

During the course of the examination of the Government's witness, Isador Bley Stein, a defendant named in the indictment, the court conducted an examination of this witness, in which he developed the fact that by permission of the court and on the request of the United States Attorney for such permission, the witness had entered a plea of nolo contendere to the indictment.

The plea of nolo contendere is, in effect, a plea of guilty.

> *U. S. vs. Hudson,* 272 U. S. 451, 455; 71 L. Ed. 347, 349.

It is fundamental that declarations even of alleged coconspirators are only admissible against a defendant when a conspiracy has first been proven, and the defendant against whom the declarations are offered, has been proven to be a member of the conspiracy. The alleged conspiracy here, under the state of the evidence, had ended some time prior to the return of the indictment. It is too academic a question to warrant a discussion that the act of Stein in pleading nolo contendere (guilty), was not an act in furtherance of the conspiracy and also inadmissible in evidence against the defendants on trial. The trial court did precisely what was done and condemned in the case of *State v. Justesen,* 35 Utah 105, 99 Pac. 456. In that case the record of the plea of guilty of perjury by the person alleged to

have been procured to commit the perjury was received in evidence, and in this case the same result was obtained by the processes of the court's own examination of the defendant Stein, not on trial. The admission in evidence of this record in the case of *State v. Justesen*, supra, was held to be error and the judgment of the lower court reversed, the court saying:

> "The record of Larson's plea of guilty to the information charging him with perjury, and the statement of the District Attorney with reference thereto, were especially prejudicial and the objections made to them should have been sustained. The rule is elementary that where two or more persons have joined to conspire together to commit a crime and have either accomplished or abandoned their common design, no one of them can by the subsequent act or declaration of his own affect his co-conspirators. 'His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence as such against any but himself.' 1 Greenl. Ev. 233. See also, Wharton, Crim. Ev. 639; People vs. Farrell, 11 Utah 419, 40 Pac. 703; 6 A. & E. Enc. Law (2d Ed.) 571, 572."

See also:

U. S. vs. Richards, 149 Fed. 443, 452;

John Brown v. U. S., 150 U. S. 93, 99, 37 L. Ed. 1010, 1013;

Graham v. U. S., 15 Fed. (2d) 740 (CCA 8).

III.
The Two Postal Cards in Question Do Not Violate Section 335, Title 18, United States Code

We come now to a consideration of what is really the primary question in this appeal. While we have discussed two errors occurring upon the trial, one of which relates to the failure of the court to give an instruction upon the presumption of innocence and for which the judgment and sentence of the lower court alone must be reversed, we desire nevertheless to discuss the question now under consideration, because if our contentions are sustained by this court, then it will lead to a reversal of the cause without being remanded for a new trial.

The questions here are raised in two ways: First, by a demurrer to the indictment, and secondly, by motions for a directed verdict. Technically the question is raised properly only by a motion for a directed verdict as to the conspiracy count, because of the general character of the charge that it was the purpose of the defendants to mail postal cards of a character denounced by Section 335, Title 18, *U. S. Code*. If the conspiracy charge had affirmatively pleaded that the purpose of the conspiracy was to mail the two cards in question, then the whole matter could have been raised by demurrer and a bill of exceptions would have been unnecessary. The primary purpose of the bill of exceptions was to limit the charge of the conspiracy in the indictment by showing that the only cards that it was the object of the conspiracy to mail was limited to these two cards. Conversely stated, the bill of exceptions excludes any other cards as being the object of the conspiracy. We are,

therefore, concerned only with the text of these two cards.

The indictment in this case is obviously one of first impression with the prosecutor for the books contain no cases whatsoever wherein a postal card was mailed or contemplated to be mailed that was anywhere near similar in text or subject matter. The question is new and presents an important matter for the determination of this court.

If the cards in question had been enclosed in an envelope it would be no offense against any law of the United States.

Embraced in the general purpose of the statute was the stopping of exposure of obscene, scurrilous and libelous material to the eye of those engaged in the postal service, such as obscene and indecent pictures and caricatures, obscene and lewd reading matter, dunning collection agency cards, and libelous and scurrilous matter obviously calculated to injuriously reflect upon the character of another. Its aim was the protection of private citizens against open exposure of such material to the gaze of the employees of the postal establishment and persons who might view the material before it was actually received by the addressee; and perhaps, also, to safeguard the morals of postal employees and persons likely to view the material before delivery. It was not designed to throttle freedom of speech or deny the use of the mails either to the press or political aspirants in the dissemination of information and news to the public at large.

The question here involved affects not only the right of the use of the mails by political candidates, but of every newspaper in the country, for the statute aims not only at the open postal card, but anything which constitutes an envelope, cover or wrapper. Every newspaper and magazine in the country come within the statute, because newspapers and magazines without any special wrapper or cover make the front and rear pages thereof the cover for the purpose of transmission and these pages are exposed to public gaze.

Even during the pendency of war, however much it may have been abridged, the right of free speech was not wholly suspended. Even the Espionage Act did not assume to and could scarcely repeal the First Amendment to the United States Constitution. The right of a citizen to discuss the affairs of his government is fundamental to any conception of a democracy. With this is the corollary right of the discussion of and dissemination of information concerning political candidates who, if successful, become the ministers of government. Section 335 was not intended to limit this right. To hold that the subject matter and text of the cards in question comes within Section 335, is to assume something which scarcely can be assumed, namely, that it has repealed the First Amendment to the United States Constitution.

We contend that the text and subject matter of the postal cards are not per se "indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or of threatening character, or calculated * * * to reflect injuriously upon the character * * * of another." To constitute an offense within Section 335, Title 18, *U. S. C.*, the

language complained of must be per se upon its face within the denunciation of the statute.

U. S. vs. Davidson, 244 Fed. 523, 525 and 526;
U. S. vs. Jarvis, 59 Fed. 357;
U. S. vs. Davis, 38 Fed. 326;
In re Barber, 75 Fed. 980;
U. S. vs. Lamkin, 73 Fed. 459.

This is particularly true because this statute does not make the publication an offense. The offense consists in using the United States mails for its circulation.

U. S. vs. Robout, 28 Fed. 523.

This view is also supported by the fact that if the card had been enclosed in a wrapper or envelope no criminal offense would have been committed. The court, in *U. S. vs. Nathan,* 61 Fed. 936, held that a libelous, defamatory or threatening letter, if enclosed in a wrapper, envelope or other covering would not fall within the inhibitions of the statute.

The statute alone creates and defines the offense, and the government cannot by suggestion, innuendo, averment or charge, add to its provisions, nor can it widen the statute's application by adding to the letter or writing something not contained therein. A violation of the statute cannot be based upon any hidden intent.

U. S. v. Davidson, supra;
Krause v. U. S., 28 Fed. (2) 248;
U. S. v. Grimm, 45 Fed. 558.

In the indictment the pleader uses the conjunction "and" rather than the disjunctive "or", as used in the

statute before the words "calculated * * * to reflect injuriously upon the character, etc." In other words, the word "or" is "and", and undoubtedly it was for that reason that the pleader drew the indictment in the conjunctive. A publication is not within the provisions of Section 335, Title 18, *U. S. C.,* unless the language thereof per se is libelous, scurrilous, defamatory *and* calculated and obviously intended to reflect injuriously, etc.

The test, therefore, in this case is whether or not the language of the publication was per se libelous, scurrilous, defamatory *and* calculated to reflect injuriously upon the character, etc., of another.

> *Swearingen v. U. S.*, 161 U. S. 448, 40 L. Ed. 765;
> *U. S. v. Moore,* 104 Fed. 78.

In *U. S. vs. Davidson,* supra, the indictment contains two counts, one for a violation of Section 211 of the *Criminal Code,* and the other for a violation of Section 212 (Sec. 335, Title 18, *U. S. C.*). The second count is based upon the abbreviation of the word "Prostitute", "Pros.", appearing on the face of the envelope following the name of the woman to whom the same was addressed. The court held that the language used must be construed—

> "as generally understood and according to their ordinary and natural and well-defined meanings."

The court also said:

> "It would seem that a statute of this character. to prevent the abuse or improper use of the United

> States post office establishment and mails, is intended for the protection of the government and general public, and not the redress of private grievances."

In the case of *U. S. v. Jarvis*, supra, the envelope contained the name of the addressee and the address as follows:

> "Room 32, Pease House, Front St., City. The Notorious";

and it was held that this was not defamatory per se and calculated to reflect injuriously upon the addressee. The court said:

> "The epithet, although presumably offensive to the person addressed, is not per se indecent, scurrilous or defamatory."

Apropos of politics the court in the case of *U. S. vs. Davis*, supra, said:

> "If the subject matter of this writing were political, having in view the almost unrestrained license in the use of defamatory epithets in political writing of almost every kind, except the very highest grade, and the fact that such epithets which in the beginning are intended to denote ignominy and turpitude, *become in the progress of political conflict, by a process of development, badges of honor and are cheerfully accepted as such.*"

The very substantial victory recorded by Mr. Cunningham (which fact may be judicially noticed) over Mr. McKnight eloquently attests the above pronouncement.

In re Barber, supra, an indictment predicated on this statute charged the sending through the mails, envelopes unsealed, containing dunning letters,

> "on the outside of which envelope was printed in 10 point or long primer French Clarendon type, in the English language, the following libelous, scurrilous and defamatory words and language, to-wit, 'Mercantile Protection and Collection Bureau,' in display letters, calculated by the size of the type, terms, manner and style of display, and obviously intended, to reflect injuriously upon the character and conduct of the person to whom said envelopes and dunning letters were directed and addressed."

The court held that the offense charged was not one that came within the statute.

Concerning the object of the statute in question, the court said that it was—

> "to protect the recipient through the mails from indecent and injurious communications which otherwise come under the cover of an envelope or wrapper * * * by attracting the notice of other persons, and raising injurious inferences."

In the case of *Dysart v. U. S.*, 272 U. S. 635, 71 L. Ed. 461, the United States Supreme Court reversed the Circuit Court of Appeals in its affirmation of the judgment of conviction. The case was laid under the analogous statute making it an offense to send through the mails any obscene, lewd, and lascivious publication. The indictment charged the defendant with having sent cards and letters of such character through the mails. These cards and letters were intended to advertise a private

home for unmarried women during pregnancy and confinement, who preferred to be away from home during such time in order "to preserve individual character or family reputation." This case contains some of the latest expressions of the Supreme Court of the United States on the subject under consideration.

In the case of *Sales v. U. S.*, 258 Fed. 597, in a prosecution under Section 334, Title 18, *U. S. C.*, the court said, in reversing the judgment and sentence:

> "It is not enough that a letter or publication be offensive to the feelings or the pride of those into whose hands it may come. Considerations of cast or social position do not enter into the law. *The evil character of the letter or publication declared non-mailable by the clause of the statute under consideration, must be reasonably apparent or discernible on its face.* We know of no case under this clause of the statute in which it has been held that, if the letter or publication in itself is not objectionable, an undisclosed motive or intent of the writer may be found to convict him."

In the case of *Warren vs. U. S.*, 183 Fed. 719, 721 (CCA 4), the court had before it for consideration an indictment charging a violation of Section 335. The envelope described in the indictment had printed in large red characters on its face the following:

> "$1000 reward will be paid to any person who kidnaps Ex. Gov. Taylor and returns him to Kentucky authorities."

Of this language the court said:

> "Aside from the question whether the language employed by the accused is scurrilous, defamatory or threatening, *it* was clearly calculated and obviously intended to reflect injuriously upon the character and conduct of the person named. * * * It was an offer of reward in prominent characters for the kidnaping and return of Mr. Taylor to Kentucky authorities * * * and according to it the accused plainly asserted that Mr. Taylor was charged with crime and was a fugitive from the justice of the State of Kentucky. It needs no discussion to show that such a charge is calculated to reflect injuriously upon one's character and conduct."

The court, in this case, in speaking of Section 335, said:

> "* * * The statute covers mail matter from creditors and collection agencies addressed to debtors and bearing externally visible charges or imputations of habitual refusal to pay just debts, threats of suits, etc., not alone because of a threatening character, *but because calculated and obviously intended to reflect injuriously upon the character and conduct of others.*"

The court, in the case of *U. S. vs. Davis,* supra, states:

> "That which shocks the ordinary and common sense of men as an 'indecency' is the test, as it is also with the other descriptive terms of the act."

And:

> *"The courts must reasonably construe the words of the act, and not allow a hypercritical judgment to take advantage of the elasticity of the language used by the Congress."*

In *Ex parte Doran,* 32 F. 76, 78, the court said (in a prosecution under Section 334):

> "It is not the province of courts to extend the statutes so as to embrace cases not *plainly* and *clearly* within their terms; and, if there is a fair doubt whether the act charged is within the purview of the law, the person who committed it is entitled to the benefit of the doubt."

Only clear and palpable infraction of the statute should be noticed.

U. S. v. Journal Co., 197 Fed. 415.

Under Section 335, the matter must be libelous, scurrilous, defamatory and calculated to and obviously intended to reflect injuriously upon the character and conduct of Mr. Cunningham. All of the elements must be present or no crime is charged. As we have pointed out above, the word "or" is "and"; and obviously for this reason the prosecution drew the complaint in the conjunctive. To be defamatory, the words must charge or impute to a person a crime, fraud, dishonesty, immorality, vice or dishonorable conduct, or must hold him up to

contempt, hatred or ridicule. In short, the words must impute moral delinquency or disreputable conduct.

> *Houston Printing Co. v. M. Moundon,* 41 S. W. 381, at 386; 15 Tex. Civ. App. 574;
> *Gideon v. Dwyer,* 33 N. Y. Supp. 754, 756;
> *Gallagher v. Bryant,* 60 N. Y. Supp. 844.

Libel is a malicious defamation of a person which exposes him to public hatred, contempt or ridicule. It must impute to a person dishonesty, dishonorable or immoral or degrading conduct.

> 4 *Blackstone Commentaries,* 150;
> *Shanks v. Stemps,* 51 N. Y. Supp. 154, 157;
> *Root v. King,* 7 Cow. (N.Y.) 613, 620;
> *Moore v. Francis,* 3 N. Y. Supp. 162, 50 Hunter 604;
> *Miller v. Donovan,* 39 N. Y. Supp. 820;
> *Goldberg v. Philadelphia,* 42 Fed. 42, 43.

To accuse one of any deficiency in some quality which does not require him, as a good citizen to possess, is not libelous per se. Defamatory words to be libelous per se must be such that the court can perceive, as a matter of law, that they will tend to disgrace the party complaining, or hold him up to public hatred, contempt or ridicule, or cause him to be shunned or avoided.

> *Baxter vs. Domington,* 13 Ariz. 140, 108 Pac. 859, 25 Cyc. 253.

Some concrete illustrations on this general subject may not be amiss. We therefore call attention to a few.

In the case of *Coldwater vs. Jewish Press,* 142 N. Y.

Supp. 188, it was held that an article was not libelous which stated that the plaintiff's wife, the mother of seven children, had committed suicide by jumping out of a window; that the woman was nervous and weak because of taking care alone of the house and seven children; that for the past three years she had been weak and fearfully nervous; and that she had constantly complained that she could not take care alone of the house, the children, an old mother and the plaintiff.

In the case of *Hatfield vs. Sissam*, 59 N. Y. Supp. 73, it was held that a statement to the effect that the plaintiff was criminally liable for his handling of the business and books of the American Athlete was not slanderous per se.

In the case of *Illinois Central Ry. vs. Ely*, 83 Miss. 519, 35 So. 873, it was held that a statement by an employer of an employee who had quit, "cause for leaving, unsatisfactory service," was not libelous per se.

The other word in the statute that we may be concerned with is the word "scurrilous." Scurrilous is vileness. It is defined in *Webster's International Dictionary* as follows:

> "Language containing low indecency, or abuse; foul; vile; obscene; vulgar."

We scarcely need mention that by no stretch of the imagination could it be contended that any of the language in this card would come under the term "scurrilous."

One of the best statements counsel was able to procure as to whether or not any of the language or words appearing on the cards in question were libelous, defama-

tory, etc., is contained in the opinion in the case of *Reid vs. Prov. Journal Co.*, 20 R. I. 120, 37 Atl. 637. The action in that case was one for libel based upon the publication by the defendant of the following item:

> "Thrice Burned, the Daniels & Cornell Block Again Visited by Fire. Damage largely by water, and estimated at $70,000, covered by insurance. At 10 o'clock last night * * * discovered smoke and flame * * *. The fiery element completely invaded the fifth floor, which was all occupied by the Messrs. Reid, who claim complete loss from fire and water. They were insured for $55,000. * * * The fire is the third to have occurred in this building in the past thirteen years. * * * Every fire in this building has started on the upper floor, and twice in Reid's printing establishment."

The court said of this article:

> "The article in question contains no defamatory language, nor do we think it is capable of the meaning attributed to it in the innuendo. It is simply a statement of an occurrence which was a proper subject of public notice and comment, and does not in any way reflect upon the *character* of the plaintiffs. * * * The only portion of the article which by any possibility could be tortured into a charge that the plaintiffs were in some way *criminally* responsible for the fire referred to is the last sentence thereof, but language is not to be forced or tortured in libel cases in order to make it actionable. It is to be taken in its plain and ordinary sense. * * * The person must be presumed to have used them in their ordinary import * * *. In the case of Roberts v. Camden, 9 East 93, the court said:

'Words are now construed by courts as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them.' The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein, is not sufficient to make it libelous."

And the court cites with approval the language in *Terwilliger vs. Wands*, 17 N. Y. 57:

"*The words must be defamatory in their nature, and must in fact disparage the character*, and this disparagement must be evidenced by some positive loss arising therefrom, directly and legitimately as a fair and natural result. In this view of the law, words which do not degrade the character, do not injure it, and cannot occasion loss."

Section 335, Title 18, *U. S. C.*, is decidedly more exacting in the quality of words and language used than a civil action of libel or defamation, because innuendo may not aid the pleader under this section. The language and words published must be libelous per se.

An analysis of these two cards discloses no scurrilous, defamatory or libelous language calculated and obviously intended to reflect injuriously upon the character of Mr. Cunningham; nor do we think it is capable of having any such meaning attributed to it, even if it were permissible under the law (which it is, of course, not) by any allegations of innuendo.

Let us consider first the card set forth as overt act No. 8 of Count I (Plaintiff's Exhibit 13). There is not

a single imputation of dishonesty in any word or line, neither does it question Mr. Cunningham's integrity or veracity. It undoubtedly raises the question of the wisdom of the voters sending a poor business man to participate in the handling of the business affairs of a large municipal corporation; and in support of this contention points out the fact that the management of the affairs of the student body was such that in the place of a surplus, a very substantial deficit resulted. By no stretch of the imagination can it be said that there is a single word in this card which indicates that Mr. Cunningham was guilty of any misapplication of funds. A man's capacity for the successful management of a business institution is quite distinct from his character as a man.

That one is lacking in these qualities over another has nothing to do with his character. Character essentially relates to the traits of honesty, integrity, veracity and morality. What was said in this card would be little different than expressing the opinion of another as being either a poor cook, a poor washerwoman, or a poor driver. Such assertions as these relate only to one's qualifications for efficiency of service and do not impart any delinquencies in the qualities of mind and morals that make up character.

All that we have said concerning this card can be said of the card appearing as overt act No. 5. We need concern ourselves only with testing the phrase "and since his gross mismanagement of finances there has led to his dismissal," as this is the only phrase which by any possibility could be tortured into an injurious reflection upon

Mr. Cunningham's character. Of this we contend that it is but a simple statement of an occurrence which was a proper subject of public notice and comment and does not in any way reflect upon Mr. Cunningham's character. To give such an effect to it would require a "forced" or "tortured" construction. The word "mismanagement" does not impute misapplication. Anyone may mismanage without being guilty of acts of dishonesty; in fact unsuccessful or neglectful management is misminagement. It partakes of the qualities of mistakes, inaccurate judgments, neglect and inefficiency. The word "gross" only characterizes the degree. The only plain and logical inference to be drawn from this statement is that Mr. Cunningham in a great degree lacked the qualities of an astute manager of income and potential income of the student body of the university. His dismissal may have been occasioned by dissipating the opportunities for potential revenues which might have enhanced the coffers of the student body, i.e., by the issuance of too many passes to athletic tournaments and social events given by the student body, failure to make a profitable banking arrangement (as was permissible in those days), whereby on deposits in excess of $1000.00 a 2% interest rate would be paid to the student body account, and for any number of reasons that the imagination might suggest could have enhanced the financial position of the student treasury. Again, the deficit may in part have resulted from extravagances for entertainment and displays at tournaments and social events of the student body. In short, a person may be the finest individual on earth and yet mismanage finances or a business. It

is idle to say that this phrase or any language in either of the two cards on its face per se charges Mr. Cunningham with being dishonest, indecent, or vile, or holds him up to hatred, contempt or ridicule.

In *Webster's New International Dictionary,* the word "mismanagement" is defined: "Wrong, bad, and bungling management; mal administration." In Words and Phrases, 2nd Ser., Vol. III, under the term "Mismanagement" the following authority is cited:

> "An allegation in an application for removal of a receiver of a company that the officers of the company mismanaged its affairs is not libelous or scandalous of the officers. The word 'mismanaged' not denoting any wrong or turpitude on the part of the persons managing. Lebovitch v. Jos. Levy & Bros. Co., 54 So. 978, 981, 128 La. 518."

In connection with this subject it is well to bear in mind the difference between criminal libel and civil libel. It is only in the case of civil libel that injuries to a man in his occupation are libelous; and this is not applicable here, because there is no charge in any of these cards as to any business of Mr. Cunningham. The fine character of Mr. Cunningham as a man is not in the slightest affected by either of these cards.

Conclusion

Before any conviction under this section should ever be sustained, the language used should plainly and clearly come within the purview of the statute, forsooth that statements of occurrences which are a proper subject of public notice and comment are not suppressed.

The government of the United States in administering this section should be actuated by the highest sense of right and justice to all, never losing sight of the fact that in carrying out the purpose of the government, the rights of the citizen and the public, as defined and given by the Constitution, must be observed and respected, and that the right of free speech and the freedom of the press must be protected.

U. S. v. Journal Co., 197 Fed. 415.

We have at length urged this latter proposition upon the court because of its vital importance to the public, and also because of our belief that although the case must be reversed for other errors occurring during the trial, that a reversal upon the grounds that these cards do not come within the purview of the statute will dispose of the cause without it being remanded for a new trial.

Respectfully submitted,

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